



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

DEC 10 2008

Brian Svoboda
Rebecca Gordon
Perkins Coie
607 Fourteenth Street, N.W.
Washington, D.C. 20005

RE: MUR 5970
EMILY's List and Ranny Cooper, and
Ranny Cooper, in his official
capacity as Treasurer

Dear Mr. Svoboda and Ms. Gordon:

On February 5, 2008, the Federal Election Commission notified your client, EMILY's List and Ranny Cooper, in his official capacity as Treasurer ("EMILY's List"), of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended ("the Act"). On October 22, 2008, the Commission found, on the basis of the information in the complaint, and information provided by you, that there is no reason to believe EMILY's List violated 2 U.S.C. § 441a(a)(1). Accordingly, the Commission closed its file in this matter.

Documents related to the case will be placed on the public record within 30 days. See Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70,426 (Dec. 18, 2003). The Factual and Legal Analysis, which explains the Commission's findings, is enclosed for your information.

If you have any questions, please contact Elena Paoli, the attorney assigned to this matter at (202) 694-1548.

Sincerely,

A handwritten signature in black ink that reads "Julie K. McConnell/eip".

Julie K. McConnell
Assistant General Counsel

Enclosure
Factual and Legal Analysis

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FEDERAL ELECTION COMMISSION

FACTUAL AND LEGAL ANALYSIS

RESPONDENTS: **EMILY's List and**
 Ranny Cooper, in his official capacity as treasurer

MUR: 5970

I. INTRODUCTION

This matter was generated by a complaint filed with the Federal Election Commission by Lori Sherwood. See 2 U.S.C. § 437g(a)(1).

II. FACTUAL AND LEGAL ANALYSIS

The complaint alleges that EMILY's List and Donna Edwards for Congress ("Committee") have "clearly joined forces" because EMILY's list sent an email promoting Edwards' candidacy, and it was approved and authorized by Edwards.

EMILY's List is an organization that works to get pro-choice Democratic women elected to public office. EMILY's List states that the complaint does not allege a violation of FECA. EMILY's List acknowledges that it sent an email soliciting contributions on behalf of Edwards. EMILY's List states, however, that the Edwards Committee authorized and paid for the email. EMILY's List further states that it has a firewall to protect itself from speculative allegations of coordination.

The Act, as amended by BCRA, provides that no person shall make contributions to any candidate and his or her authorized political committee with respect to any election for federal office, which, in the aggregate, exceed \$2,300. 2 U.S.C. § 441a(a)(1)(A).

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Under the Act and Commission regulations, the terms "contribution" and "expenditure" include any gift of money or "anything of value" made by any person for the purpose of influencing a Federal election. See 2 U.S.C. §§ 431(8)(A)(i) and (9)(A)(i); 11 C.F.R. §§ 100.52(a) and 100.111(a). The phrase "anything of value" includes all in-kind contributions. See 11 C.F.R. §§ 100.52(d)(1) and 100.111(e)(1). In-kind contributions include expenditures made by any person "in cooperation, consultation, or concert, with, or at the request or suggestion of" a candidate, a candidate's authorized committees, or their agents. 2 U.S.C. § 441a(a)(7)(B)(i).

Commission regulations specify a three-prong test to determine whether a payment for a communication becomes an in-kind contribution as a result of coordination between the person making the payment and a candidate. See 11 C.F.R. § 109.21(a)(1)-(3). Under the first prong of the coordinated communication test, the communication must be paid for by a person other than a candidate, a candidate's authorized committee, a political party committee, or agents of any of the foregoing. See 11 C.F.R. § 109.21(a)(1). Under the second prong, the communication must satisfy one of the four content standards set forth in 11 C.F.R. § 109.21(c).¹ Under the third

¹ After the decision in *Shays v. FEC*, 414 F.3d 76 (D.C. Cir. 2005) (Court of Appeals affirmed the District Court's invalidation of the fourth, or "public communication," content standard of the coordinated communications regulation), the Commission made revisions to 11 C.F.R. § 109.21 that became effective July 10, 2006. In a subsequent challenge by Shays, the U.S. District Court for the District of Columbia held that the Commission's content and conduct standards of the coordinated communications regulation at 11 C.F.R. § 109.21(c) and (d) violated the Administrative Procedure Act; however, the court did not vacate the regulations or enjoin the Commission from enforcing them. See *Shays v. FEC*, 508 F.Supp.2d 10, 70-71 (D.D.C. Sept. 12, 2007) (NO. CIV.A. 06-1247 (CKK)) (granting in part and denying part the respective parties' motions for summary judgment). Recently, the D.C. Circuit affirmed the district court with respect to, *inter alia*, the content standard for public communications made before the time frames specified in the standard, and the rule for when former campaign employees and common vendors may share material information with other persons who finance public communications. See *Shays v. FEC*, ___ F.3d ___, (D.C. Cir. 2008).

prong, the communication must satisfy one of the five conduct standards set forth in 11 C.F.R.

§ 109.21(d).²

EMILY's List has set forth specific facts to refute charges of coordination, including that the Committee paid for the communication. Thus, the payment prong of the coordination regulations is not met. *See* 11 C.F.R. § 109.21(a)(1). Therefore, there is no reason to believe that EMILY's List and Ranny Cooper, in his official capacity as Treasurer, violated 2 U.S.C. § 441a(a)(1) by making an excessive in-kind contribution in the form of a coordinated communication.

² The conduct prong is satisfied where any of the following types of conduct occurs: (1) the communication was created, produced or distributed at the request or suggestion of a candidate or his campaign; (2) the candidate or his campaign was materially involved in decisions regarding the communication; (3) the communication was created, produced, or distributed after substantial discussions with the campaign or its agents; (4) the parties contracted with or employed a common vendor that used or conveyed material information about the campaign's plans, projects, activities or needs, or used material information gained from past work with the candidate to create, produce, or distribute the communication; (5) the payor employed a former employee or independent contractor of the candidate who used or conveyed material information about the campaign's plans, projects, activities or needs, or used material information gained from past work with the candidate to create, produce, or distribute the communication; or (6) the payor republished campaign material. *See* 11 C.F.R. § 109.21(d).